No. 12,778

# In the United States Court of Appeals for the Ninth Circuit

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

*v.*

OLIVER LA DUKE, AN INDIVIDUAL DOING BUSINESS UNDER THE NAME AND STYLE OF LA DUKE LUMBER COMPANY, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON*

## BRIEF FOR APPELLANT


WILLIAM S. TYSON,
*Solicitor,*
BESSIE MARGOLIN,
*Assistant Solicitor,*
WILLIAM A. LOWE,
LEONARD APPEL,
*Attorneys,*
*United States Department of Labor,*
*Washington, D. C.*

KENNETH C. ROBERTSON,
*Regional Attorney.*

# INDEX


| | Page |
|---|---|
| Statement of jurisdiction | 1 |
| Statement of the case | 3 |
| Question presented | 16 |
| Specification of errors | 16 |
| Summary of argument | 18 |
| Argument: | |
| I. The loaders and the bookkeeper are employees of appellee within the meaning of the Act | 20 |
| A. The loaders | 26 |
| B. The bookkeeper | 38 |
| II. Appellee in any event should have been adjudged in contempt for violating the "hot goods" provision of the injunction | 43 |
| Conclusion | 45 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| (*American*) *Lumbermens Mut. Cas. Co.* v. *Timms & Howard*, 108 F. 2d 497 | 14 |
| *Bartels* v. *Birmingham*, 332 U. S. 126 | 20, 34, 36, 42 |
| *Baumgartner* v. *United States*, 322 U. S. 665 | 31 |
| *Bowser* v. *State Industrial Accident Comm.*, 185 P. 2d 891 | 37 |
| *Broderick, Henry, Inc.* v. *Squire*, 163 F. 2d 980 | 22 |
| *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 | 24 |
| *Brown* v. *Luster*, 165 F. 2d 181 | 33, 42 |
| *Brown* v. *Minngas Co.*, 51 F. Supp. 363 | 40 |
| *Cassone* v. *Wm. Edger John & Associates*, 185 Misc. 573, 57 N. Y. S. 2d 169 | 40 |
| *Cosmopolitan Co.* v. *McAllister*, 337 U. S. 783 | 20 |
| *Earle* v. *Babler*, 180 F. 2d 1016 | 35, 36, 37, 41 |
| *Eilenbecker* v. *Plymouth County*, 134 U. S. 31 | 13 |
| *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 | 44 |
| *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. 2d 462 | 31 |
| *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755 | 19, 39 |
| *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, modified on another point and affirmed, 317 U. S. 564 | 40 |
| *Fleming* v. *Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 | 13 |
| *George Lawley & Son Corp.* v. *South*, 140 F. 2d 439 | 19, 39 |
| *Gompers* v. *United States*, 233 U. S. 604 | 13 |
| *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704 | 18, 19, 20, 26 |
| *Henry Broderick, Inc.* v. *Squire*, 163 F. 2d 980 | 22 |
| *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 | 39 |
| *Hogue* v. *National Automotive Parts Assn.*, 87 F. Supp. 816 | 40 |
| *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447 | 13 |
| *Knapp* v. *Imperial Oil & Gas Products Co.*, 130 F. 2d 1 | 31 |

Cases—Continued


| | Page |
|---|---|
| *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704 | 31 |
| *McComb* v. *Crane*, 174 F. 2d 646 | 46 |
| *McComb* v. *Farmers Reservoir and Irrigation Co.*, 167 F. 2d 911, affirmed 337 U. S. 755 | 25 |
| *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 | 23 |
| *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, reversing 167 F. 2d 448 | 2, 14, 46, 47 |
| *McComb* v. *Norris*, 177 F. 2d 357 | 2, 46, 47 |
| *McComb* v. *United Block Co.*, 9 WH Cases 194 | 33 |
| *Meeker Cooperative Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 | 40 |
| *Moss* v. *Postal Telegraph-Cable Co.*, 42 F. Supp. 807 | 40 |
| *National Labor Relations Board* v. *Atkins & Co.*, 331 U. S. 398 | 23 |
| *National Labor Relations Board* v. *Gullet Gin Co.*, 71 S. Ct. 337 | 23 |
| *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111 | 21, 22, 24, 25 |
| *Orvis* v. *Higgins*, 180 F. 2d 537, certiorari denied 340 U. S. 810 | 31 |
| *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 | 39 |
| *Pacific Portland Cement Co.* v. *Food Mach. & Chemical Corp.*, 178 F. 2d 541 | 31 |
| *Penfield Co.* v. *Securities & Exchange Comm.*, 330 U. S. 585, affirming 157 F. 2d 65 | 2, 46 |
| *Powell* v. *United States Cartridge Co.*, 339 U. S. 497 | 18, 20, 22 |
| *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 | 39 |
| *Roland Electrical Co.* v. *Walling*, 326 U. S. 657 | 25, 39 |
| *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, affirming 156 F. 2d 513 | 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 42 |
| *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518 | 37 |
| *Smith* v. *Royal Ins. Co.*, 125 F. 2d 222 | 31 |
| *Southern Advance Bag & Paper Co.* v. *United States*, 133 F. 2d 449 | 44 |
| *Stuart Oxygen Co.* v. *Josephian*, 162 F. 2d 857 | 31 |
| *Sun Insurance Office* v. *Be-Mac Transport Co.*, 132 F. 2d 535 | 31 |
| *Tobin* v. *Rockett*, 10 WH Cases 81 | 33 |
| *United States* v. *Aberdeen Aerie No. 24*, 148 F. 2d 655 | 22, 35, 41 |
| *United States* v. *Darby*, 312 U. S. 100 | 25, 44 |
| *United States* v. *Grand Flower & Ornament Co.*, 47 F. Supp. 256 | 13 |
| *United States* v. *Rosenwasser*, 323 U. S. 360 | 18, 21 |
| *United States* v. *Silk*, 331 U. S. 704 | 18, 19, 20, 23, 26, 31, 32, 33, 34, 36, 37, 42, 43 |
| *United States* v. *United States Gypsum Co.*, 333 U. S. 364 | 31 |
| *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391 | 43 |
| *Walling* v. *Acosta*, 140 F. 2d 892 | 44 |
| *Walling* v. *American Needlecrafts*, 139 F. 2d 60 | 43 |
| *Walling* v. *Belikoff Bros.*, 147 F. 2d 1008 | 44 |
| *Walling* v. *Friend*, 156 F. 2d 429 | 40 |
| *Walling* v. *Men's Hats*, 61 F. Supp. 803 | 13 |
| *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 | 44 |
| *Walling* v. *Richmond Screw Anchor Co.*, 52 F. Supp. 670 | 13 |
| *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944 | 43 |
| *Walling* v. *Yeakley*, 140 F. 2d 830 | 39 |
| *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 | 40 |

Cases—Continued Page
*Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65, certiorari denied 333 U. S. 862 ---- 43
*Western Union* v. *Lenroot*, 323 U. S. 490 ---- 45
Federal Statutes:
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201:
Sec. 3 (d) ---- 21
Sec. 3 (e) ---- 21
Sec. 3 (g) ---- 21
Sec. 3 (j) ---- 45
Sec. 7 ---- 3
Sec. 13 (a) (6) ---- 39
Sec. 15 ---- 2
Sec. 15 (a) (1) ---- 20, 44
Sec. 17 ---- 1, 2
Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U. S. C., Supp. III, sec. 201 ---- 23
18 U. S. C. Sec. 3691 ---- 13
28 U. S. C., Secs. 1291, 1294 ---- 3
Miscellaneous:
81 Cong. Rec. 7657 (1937) ---- 21
Federal Rules of Civil Procedure:
Rule 39 (c) ---- 13
Rule 52 ---- 14
Reorganization Plan No. 6 of 1950 (15 F. R. 3174) ---- 2

# In the United States Court of Appeals for the Ninth Circuit

No. 12,778

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

*v.*

OLIVER LA DUKE, AN INDIVIDUAL DOING BUSINESS UNDER THE NAME AND STYLE OF LA DUKE LUMBER COMPANY, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON*

## BRIEF FOR APPELLANT

### STATEMENT OF JURISDICTION

This is an appeal from a final order (R. 82–83) of the United States District Court for the District of Oregon, denying the relief requested in a civil contempt proceeding. This contempt proceeding grew out of an action brought by the Administrator of the Wage and Hour Division of the United States Department of Labor pursuant to Section 17 of the Fair Labor Standards Act of 1938, which expressly confers jurisdiction on the district courts of the

United States to restrain violations of the Act.[1] On February 20, 1941, the district court entered a judgment permanently enjoining appellee from violating the overtime compensation, record-keeping and shipment provisions of the Act (R. 3–13). The application for adjudication in contempt, filed by the Administrator on July 25, 1949,[2] alleged that during a specified period appellee violated the injunction by employing three named individuals working as lumber loaders, and a bookkeeper, contrary to the requirements of the injunction (R. 14–19). The court's jurisdiction in this proceeding rests on its inherent power to enforce its decrees.[3]

After a trial (R. 99–357) the court below made "Findings of Fact" and "Conclusions of Law" (R. 73–82), and entered its final judgment on August 31, 1950, dismissing the application for an adjudication in contempt (R. 82–83). Notice of appeal to this

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq., hereinafter called "the Act."

Section 17 provides in pertinent part: "The district courts of the United States * * * shall have jurisdiction, for cause shown, * * * to restrain violations of Section 15." Section 15 prohibits the violations here alleged.

[2] Subsequent to the filing of the contempt action, the Secretary of Labor, by virtue of Reorganization Plan No. 6 of 1950 (15 F. R. 3174), succeeded to the Administrator's right to bring legal proceedings under the Act. By order of this Court, the Secretary has been substituted in place of the Administrator as appellent in this action (R. 361–362).

[3] See *Securities and Exchange Commission* v. *Penfield*, 157 F. 2d 65 (C. A. 9), affirmed 330 U. S. 585; *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187; *McComb* v. *Norris*, 177 F. 2d 357 (C. A. 4). The latter two cases were civil contempt actions, like the instant case, to enforce decrees entered under Section 17 of the Fair Labor Standards Act.

Court was filed on October 27, 1950 (R. 89–91). This Court has jurisdiction to review the judgment below under 28 U. S. C. Sec. 1291 and 1294 (1).

## STATEMENT OF THE CASE

The contempt application and supporting affidavits (R. 14–28) allege that appellee violated the terms of the district court's injunction in the period from about April 26 to October 1, 1948, by paying less than the overtime wages required by Section 7 of the Act to three lumber loaders (named Derrin, Adams and Pew), by failing to keep wage and hour records for these three and for a fourth employee, the bookkeeper (named Nelson), and by shipping and selling "hot" goods produced by employees not paid the statutory overtime. Appellee's response (R. 30–34), following the issuance of an order to show cause (R. 29–30), denied any violation of the injunction on the ground that the four persons named in the contempt application were not his employees but "worked as independent contractors" during the period specified (R. 31).

There is no material dispute on the basic facts showing the arrangement and relationship between appellee and each of the four persons in question.[4] They are essentially summarized in the pretrial stipulation (R. 34–41) agreed to by the parties, and are confirmed and supplemented by the documentary exhibits and other uncontroverted evidence adduced at the trial.

[4] The general conclusory "findings of fact," as distinguished from the stipulated and evidentiary facts, are, of course, disputed by appellant, as more fully pointed out *infra*, pp. 15–17, 30–31, and throughout the *Argument*.

The La Duke Company operates a saw and planing mill at Cushman, Oregon, a small town of about fifty inhabitants (R. 35, 202). During the period included in the contempt action, from about April 26 to October 1, 1948, appellee employed approximately 35 employees in the production, sale and distribution of lumber (Stip. R. 35),[5] in addition to the three loaders and the bookkeeper whose status is involved here. The latter four, like appellee's admitted employees, concededly performed their work on appellee's premises and appellee furnished them with substantially all of the equipment and supplies used in the performance of their work (Stip. R. 39–40; R. 181–182). Appellee's premises include the mill where the sawing, trimming and planing operations are carried on (R. 178–179), the "green chain" directly behind the mill, where the lumber is graded and pulled for length (R. 199), the lumber yard, where the boards are stacked, tallied and counted and picked up by the "lumber carrier" (a truck especially adapted to pick up a load of lumber (R. 200), and a near-by loading dock (about one-half mile from the mill) where the lumber is delivered by the lumber carrier and loaded on railroad cars (R. 179, 312).

Appellee's business, as described by Bloise La Duke (a son of appellee and, together with his brother, active manager of the business, R. 131), is carried on in the manner of a continuous "production-line operation" (R. 182), and the various processes, from the sawing at the mill through the loading on the cars, follow one another continuously with as little delay

[5] "Stip." refers to the pretrial stipulation.

as possible (R. 182–185, 314, 322). How interrelated a part of this continuous process and of appellee's business is the work of the loaders and the bookkeeper is clear from the following summary of the undisputed evidence as to the nature of their duties and the manner in which they perform their work.

## The Loaders

The loaders work right alongside of admitted employees of appellee. The drivers of the lumber carrier, which conveys the lumber from the storage yard to the loading dock, are admittedly the lumber company's employees (Stip. R. 41; R. 224–225). All necessary instructions for the loading are delivered to the loaders on a tally card brought from appellee's office by the carrier driver along with the lumber to be loaded. On the tally card is designated the number of the particular railroad car assigned, the type of lumber to be loaded, "the size of the material, the amount and grade that is to go in that car," and any special instructions as to the manner of loading, when any variation from "straight loading" is wanted (R. 205–206, 231–232). The loaders are expected to have the car loaded in accordance with the instructions on the tally sheet "as nearly as it was possible to do it" (R. 206, 222). Appellee (not any of the loaders) determines when, what type, and how many cars are needed, and orders them from the railroad company (R. 170–171, 205). Appellee also pays any demurrage charges if the loading of the cars is not completed

937156—51——2

within the time allotted (R. 170–171). Ordinarily the lumber is loaded into the cars as quickly as possible after it is delivered by the carrier (R. 185, 322). While the three loaders here in question (Derrin, Adams and Pew) formed the regular loading crew during the period in question, appellee also assigned "his admitted mill employees" to work along with them whenever, as frequently happened, they were unable to load all of the lumber delivered for loading or if any of the three fell ill (R. 161–162, 217). These mill employees were paid by appellee for this work at their regular mill hourly rate (Stip. R. 39; R. 143, 161–162, 172–173, 217, 226). Derrin and Adams concededly were appellee's employees prior to April 26, 1948 (R. 189–190), when they were paid at an hourly rate of pay with statutory overtime for work which sometimes included tallying and carloading identical to the work they later performed exclusively during the period here in question (Stip. R. 38–39; R. 211, 238; Plaintiff's Exhibits [6] 6, 7). The carrier driver, also admittedly appellee's employee, was required to use his vehicle to assist in the loading operations when it was needed, as it usually was for the purpose of moving the load during the last part of the loading of a car (Stip. R. 41; R. 313, 314, 319–321).

The loading, which is a "very simple" process, was usually accomplished by Adams' handing the boards from the dock to Pew, whose station was inside the

---

[6] Abbreviated hereinafter as "Pltf. Ex." By stipulation of the parties and order of this Court, it was agreed that the documentary exhibits of record may be referred to in their original form in order to reduce printing costs (R. 364–365).

railroad car stacking the lumber, while Derrin stood on the dock and made a tally mark in the appropriate grade column on the tally card (R. 179–180, 238, 224; Pltf. Ex. 16). "The tally man counts the number of pieces in each dimension and in each grade and marks the number under the column and puts a circle around it so that it can be easily computed in the office" (R. 224). The tally card is then returned to the carrier driver who takes it back to appellee's office at the mill (R. 225). Generally when the loading of one car is finished, there is another car to be loaded immediately after, and "the carrier driver brings up another tally sheet for the next car" (R. 224). The completed tally cards are used both for computing the amounts due the loaders and for billing appellee's customers (R. 160, 207).

In addition to the fact that the work was performed on appellee's premises, and with the assistance of appellee's admitted employees, appellee also furnished all of the equipment used in the loading, including an electric hoist, roller, handsaw, hammers, nails, steel bands, binders and tally cards, and, of course, the lumber carrier (valued at $8,000) (Stip. R. 40–41; R. 181, 320–321). The loaders themselves furnished no equipment or facilities of any kind (R. 245).

As already noted, the manner in which the loading was to be performed was controlled by detailed loading instructions on the tally card for each shipment. The loading process was sufficiently simple and the crew sufficiently experienced as to require no supervision on the job (R. 145, 243, 247, 261). However, in addition to the instructions given on the tally sheet,

Bloise La Duke at least once every day went down to the lumber loading dock "to get the initials and numbers off the car, light weight, load limit, and capacity," and to see how the loading was progressing (R. 144–145). And, although no strict schedule of working hours was expressly prescribed for the loaders, their hours were automatically determined by the lumber deliveries and the car allocation and shipping schedules fixed by appellee (R. 205).

The three-man loading crew was compensated on a piece rate or "contract" basis according to the volume of lumber loaded, at the rate of $1.25 per thousand board feet, and an additional $4.00 for each flat or gondola car that was "staked" (Stip. R. 37; R. 160, 163). This so-called "contract pay" was not paid in a lump sum to the head of the crew but was apportioned in appellee's office and paid to each of the three individually in appellee's office on appellee's regular monthly pay day for all of its employees (R. 160–161). Of the $1.25, Adams and Pew received 45¢, and Derrin (the supposed "employer" of the crew) 35¢, or 10¢ less; the $4.00 was evenly divided among the three (R. 227). Each was paid by appellee by separate check on the same pay day and in the same manner as appellee's mill employees (R. 140–141, 227–228). The loaders also shared the privilege extended to all of appellee's employees, of drawing on the amounts due them in advance of pay day on a regular monthly "draw day" (R. 140).

As in the case of all of appellee's admitted employees, appellee has deducted from the compensa-

tion of the loaders Federal and State income tax withholdings, and Social Security deductions, and also has made the employer's Social Security contributions pursuant to laws requiring such payments by employers but not on behalf of independent contractors (Stip. R. 38; R. 126–129, 134–135, 164–166; Pltf. Exs. 21–A, 21–B, 21–C). Similarly, as in the case of all of appellee's admitted employees, appellee made regular deductions from the compensation of the loaders to provide them with coverage under the company's accident and illness protection program, which by the express terms of the two basic contracts involved, applied only to its employees (Stip. R. 38; R. 167–170; Pltf. Exs. 13, 15, 20–A, 20–B).[7] The pay deductions for this purpose which had previously been made when Derrin and Adams were admitted employees of appellee were continued without interruption when

[7] The policy for medical services and hospitalization is specifically limited to "employees whose names appear each month on the payroll" and those "temporarily unemployed" (Pltf. Ex. 13, par. 9 (b)).

With respect to the accident insurance, the company procured an individual policy for each of the loaders and paid the major share of the cost, in conformity with its practice "to have our men insured at all times" (R. 126; Pltf. Exs. 20–A, 20–B); the contractual "Agreement" between appellee and each of the insured provided that the "cooperative arrangement ['by the employer and employee'] for insurance * * * shall terminate upon the termination of employment" (Pltf. Ex. 15). The annual premium on each policy was $117.00, of which the insured contributed $15.00 at the rate of $1.25 per month (Pltf. Exs. 6, 7, 8, 20–A, 20–B; R. 170). The agreement also specified that in case of an accidental injury to the employee, the employee shall elect whether he will accept the insurance benefits on account of such accidental injury or whether he "will seek to recover damages therefor from the employer" (Pltf. Ex. 15).

they shifted from mill work to the carloading crew around April 26, 1948 (R. 216–217, 240; Pltf. Exs. 6, 7).

During the period in question, Derrin, Adams and Pew worked exclusively for appellee (R. 227). They had no business organization; they maintained no office, did not shift as a unit from one lumber mill to another, and did not otherwise hold themselves out to other firms as an independent business in the market for loading assignments (R. 189, 202–203, 227, 229–230). While Oliver and Bloise La Duke testified that they regarded the loading crew as independent contract work and that it was the "custom" in their vicinity to have the loading done by "contract" (R. 312), the *sole* evidence on which this statement was based was that the loading was paid for on a "contract basis" (i. e., a piece rate per thousand boards loaded), as distinguished from an hourly basis (R. 317–319, 323–326, 327). Oliver La Duke frankly testified that he "didn't know the difference between an employee and a contractor. I always thought of them working for me" (R. 148).

### The Bookkeeper

The bookkeeper, Nelson, keeps all the books and records for appellee's business (Stip. R. 37), "seeing that paydays, checks, invoices and statements are gotten out on time" (R. 198), and performing the "general office work" in connection with the day-to-day and month-to-month operation of the mill (R. 263–267). He performs his duties in an office on appellee's mill premises (Stip. R. 39, 40; R. 262). He works regu-

lar hours at the company office, ordinarily from 8 a. m. to 5 p. m. daily, with one hour for lunch, five days per week (R. 262–263), for which appellee pays him at a regular monthly rate of $325.00 by check made out at the same time and in the same manner as pay checks for the regular mill employees (Stip. R. 37; R. 273–275).

The work is largely routine in character—it "doesn't vary" and "repeats itself month after month,"—and includes keeping the current records and accounts which are vital to the continued orderly functioning of appllee's business (R. 183–184, 264, 268, 273). The records and accounts pertain to such matters as lumber production and shipments, the time and payroll records, disbursements, accounts receivable and payable, and bank deposits (R. 264–267). Nelson is not qualified as a certified public accountant but does just "ordinary" bookkeeping and "general office work" (R. 262–267). While Nelson from time to time does some bookkeeping work for other concerns while on duty at appellee's office (R. 262, 278), he is obliged to devote "most" of his working time, "from eight to five five days a week," to the demands of appellee's business (R. 263). The bookkeeper who preceded Nelson, and who was admittedly considered an employee of the company, performed "practically the same" work for appellee as Nelson's (R. 186–187).

In addition to an office, Nelson is furnished all other usual equipment and office facilities, such as a desk, typewriter, telephone, check protector, and the books and records necessary for his bookkeeping duties

(Stip. R. 40; R. 271). And, as the stipulation recites, "All operating expenses for the keeping of books and records herein involved were paid for" by appellee (Stip. R. 41). Except for an electric adding machine and some binders which Nelson owned and brought to the office (R. 197, 278), he did not furnish or bear the expenses for any equipment or supplies.

While Nelson's activities are of either such a clerical or of such a specialized nature as to require little or no detailed direction and control (R. 183, 265–267, 278), he performs his work as the "occasion requires" in accordance with the express directions (as to "how it is supposed to be handled") of Bloise La Duke (R. 274), whose managerial duties on behalf of appellee include taking "care of most of the office work" (R. 130–131). Like appellee's employees generally, Nelson works under an oral arrangement and is subject to discharge by appellee at will and without notice (Stip. R. 41).

As in the case of the loaders and of appellee's admitted employees generally, regular deductions have been made from Nelson's salary for income tax withholding, Social Security, and for coverage under the health and accident insurance taken out by appellee for its "employees" (Stip. R. 38; R. 271–272; Pltf. Ex. 13).

### Violations

Admittedly appellee during the period involved "did not pay any extra overtime compensation for any work in excess of forty (40) hours per week" to the loading crew, Derrin, Adams, and Pew, nor "keep

any wage or hour records concerning" them or the bookkeeper Nelson (Stip. R. 38).

### THE "FINDINGS" AND DECISION BELOW

The court below held that the loaders and the bookkeeper were "independent contractors," not employees, and therefore dismissed the application for adjudication in contempt (R. 80, 82–83, 84–88).

This decision was predicated on "findings of fact" made in the first instance by a jury empaneled by the trial judge upon his own motion (R. 51). Neither party made a request for a jury trial at any stage of the proceedings and Government counsel pointed out at the outset that there was no right to a jury trial in a civil contempt action (R. 102).[8] Since, as

[8] That trial by jury was not a matter of right is clear from the Supreme Court decisions, and has been conceded by appellee's counsel. See *Interstate Commerce Com.* v. *Brimson*, 154 U. S. 447, 489; *Gompers* v. *United States*, 233 U. S. 604; and *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36. For decisions to this same effect specifically under the Fair Labor Standards Act, see *Walling* v. *Men's Hats*, 61 F. Supp. 803 (D. Md.); *United States* v. *Grand Flower and Ornament Co.*, 47 F. Supp. 256 (N. D. N. Y.); see also *Fleming* v. *Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 (W. D. La.); *Walling* v. *Richmond Screw Anchor Co.*, 52 F. Supp. 670 (E. D. N. Y.) In his brief filed in the district court, counsel for appellee stated: "This proceeding in contempt is in the nature of a suit in equity the same as existed prior to the present rules of civil procedure. The Defendant therefore concedes that the verdict of the jury must be considered advisory only under Rule 39 (c) * * *". (Rule 39 (c) provides that "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury * * *.").

The only right to jury trial in contempt cases is that provided by 18 U. S. C. Sec. 3691 for "willful" disobedience of court orders where the act or omission "also constitutes a criminal offense under any Act of Congress." Although the court below seemed

Government counsel also pointed out, the sole question in issue was whether there was an employer-employee relationship within the special statutory definitions of the Fair Labor Standards Act (R. 105), and since the basic facts pertinent to this issue were not in dispute and were largely agreed to in the pretrial stipulation, the function to be served by the jury was not clear and caused some confusion in the presentation of the case. However, in its opinion, the court stated that it was immaterial "whether this jury is advisory or mandatory" (R. 70), because the court "would have arrived at the same findings and conclusions independently upon the evidence submitted, and adopts the detailed findings as its own" (R. 70–71, 87). For purposes of appellate review, therefore, this makes it clear that the findings are on the same plane as if made by the trial court without a jury, "so that the review on appeal is from the court's judgment as though no jury had been present" (See (*American*) *Lumbermens Mut. Casualty Co.* v. *Timms & Howard,* 108 F. 2d 497, 500 (C. A. 2)).[9]

---

to think that "willfulness" was an element of the case (see Fdg. XXXIII, R. 80, and pretrial statements of the court, R. 108, 109), the Government's application did not charge "willful" violations, and (as Government counsel pointed out to the court below, R. 108, 109) it is now settled by a Supreme Court decision under this very Act that "the absence of willfulness does not relieve from civil contempt." See *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191, 193.

[9] Why the court's "findings of fact" in the instant case should not be regarded as conclusive on this appeal or decisive of the ultimate legal issue, under Rule 52 of the Federal Rules of Civil Procedure, is fully discussed in the Argument, *infra*, pp. 30–31.

The "detailed findings" (R. 73–82) do not contain or describe any of the evidentiary facts but are largely conclusory inferences or ultimate legal conclusions couched in terms of the general criteria used by the courts to differentiate an employment relation from an independent contractor, such as: that appellee "did not have any authority to control" and "did not exercise control" over the loading or the bookkeeping (fdgs. XII and XIII, R. 76), that "the success of the loading [and of keeping the books and records] * * * depended primarily upon the foresight" of Derrin and Nelson respectively (fdgs. XII and XIII, R. 76–77), that their work subjected Derrin and Nelson to "risk" and "out of pocket financial loss" (fdg. XI, R. 76), and that neither the loading nor the keeping of the books and records "was a part of an integrated unit of production" (fdg. XV, R. 77), and that Derrin "performed the loading of the railroad cars as an independent businessman" (fdg. XVIII, R. 77–78), and that "Nelson performed the keeping of the books and records as an independent business man engaged in the bookkeeping business" (fdg. XIX, R. 78). One "finding" (fdg. XXXII, R. 80) characterized by the court as "most impressive" was "the finding * * * that there was a custom to have the loading of cars performed by independent contractors 'in this community' " (R. 70, 87).

The "findings" represented the answers to a series of interrogatories submitted to the jury, which were drafted by counsel in compliance with the court's direction (R. 106–107, 341–151). The court submitted the interrogatories to the jury as simple "ques-

tions of fact" without giving any instructions as to the statutory definitions "because the questions relate to matters of fact" and the jury "is not to pass on any question of law or anything relating to a question of law" (R. 341). Commenting on particular interrogatories, the court indicated clearly that the answers depended upon whether the jury thought the workers were conducting themselves as "employees or independent contractors" (R. 343–344), again without making any reference to the statutory definitions.

The pertinent statutory definitions were not mentioned by the court below either in its opinion or its amended opinion (R. 67–71, 84–88), or its "findings of fact and conclusions of law" (R. 71–82). In accordance with the trial court's statement at the outset of the proceeding that he especially wanted a jury "because otherwise the Courts are going to say it is a question of law" (R. 107), throughout the proceedings, the court emphasized the factual aspects of the employment issue almost to the complete exclusion of the statutory and legal aspects (e. g.: R. 106–107, 341).

## QUESTION PRESENTED

Whether the lumber loaders and the bookkeeper are "employees" of appellee within the meaning of the Fair Labor Standards Act.

## SPECIFICATION OF ERRORS

1. The court below erred in holding that the loaders, Derrin, Adams, and Pew, were not "employees" of appellee within the meaning of the Act, and that

Derrin occupied the status of an "independent business man."

2. The court below erred in holding that the bookkeeper, Nelson, occupied the status of an "independent businessman" and was not an "employee" of appellee within the meaning of the Act.

3. The court below erred in making findings VII, VIII, XI through XIII, XV through XXIX, XXXII, XXXIV, and XXXV (R. 76–80) (which include virtually all of the findings having any substantial relevance to the employment issue), in that these "findings" are essentially legal conclusions based upon a mistaken conception of the employment relationship covered by the Act, and insofar as they contain factual elements are clearly erroneous because they are contrary to stipulated facts and undisputed evidence.

4. The court below erred in dismissing the contempt application and in failing to adjudge appellee in contempt for violating the terms of the court's injunction entered on February 20, 1941, ordering appellee to comply with the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938.

5. The court below erred in dismissing the contempt application and failing to adjudge appellee in contempt for violating the provision of the injunction against the shipment and selling of so-called "hot" goods, even assuming that the loaders and the bookkeepers were not appellee's employees.

SUMMARY OF ARGUMENT

I

The district court's holding that appellee was not in contempt on the ground that the loading and the bookeeping were "independent" businesses is clearly erroneous and cannot be sustained on this record. The decisions of the Supreme Court which are controlling here not only demonstrate that the court below misconceived and plainly gave inadequate consideration to the applicable principles for determining what relationships are employment subject to the Act, but also conclusively establish that the loaders and the bookkeeper are appellee's employees within the meaning of the Act. *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722; *United States* v. *Albert Silk and Harrison* v. *Greyvan Lines,* 331 U. S. 704. These and other leading decisions of the Supreme Court, establish that the Act is a remedial statute whose purposes require a broad interpretation of the employment relationships within its scope; the statute "contains its own definitions, comprehensive enough to require its application to many persons and working relationships * * * not [previously] deemed to fall within an employer-employee category." The *Rutherford* case, 331 U. S. at 729; *United States* v. *Rosenwasser,* 323 U. S. 360, 362; *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 516.

A. The loaders are manual laborers within the class of persons clearly intended to be covered by the Act. The indicia of an employment relationship are much clearer here even than in the *Rutherford* and *Silk* cases,

where the district court's "findings" to the contrary were reversed on appeal. The simple nature of the loader's work, the close interrelation of their work with that of admitted employees in appellee's integrated production process, their basis of compensation, their lack of independent business organization and financial resources, appellee's classification of them as employees with respect to method of payment and standard deductions from their pay, the performance of their work on appellee's premises and with appellee's equipment and supplies, and the degree of control and supervision exercised by appellee—are all characteristics of an employment relationship rather than that of independent contractor.

B. The relationship between appellee and the bookkeeper, when examined in the light of each of the above-mentioned criteria, is just as conclusively that of employer-employee. The bookkeeper is typical of the white collar office worker whose employee status, which would be clear even under common law concepts, has never been challenged in the numerous factually analogous cases arising under the Act, where other unrelated issues were presented for decision (e. g., *Farmers Irrigation Co.* v. *McComb,* 337 U. S. 755; *George Lawley & Son Corp.* v. *South,* 140 F. 2d 439 (C. A. 1).

## II

Even assuming that Derrin, not appellee, was the employer of the loaders, Adams and Pew, appellee should have been adjudged in contempt for shipping

in commerce goods produced by these employees who, to appellee's knowledge, were not paid statutory overtime compensation. This was in clear violation of Section (2) of the district court's injunction which is coextensive with Section 15 (a) (1) of the Act.

## ARGUMENT

### I

### The loaders and the bookkeeper are employees of appellee within the meaning of the Act

The Supreme Court's decisions in *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, affirming 156 F. 2d 513 (C. A. 10) (Fair Labor Standards Act), *United States* v. *Albert Silk* and *Harrison* v. *Greyvan Lines,* 331 U. S. 704 (Social Security Act),[10] are directly in point and controlling here. These decisions demonstrate that the court below in the instant case misconceived the applicable principles for determining what employment relationships are subject to such remedial legislation; they also conclusively establish, we submit, that the loaders and bookkeeper are appellee's employees within the meaning of the Fair Labor Standards Act.

The instant case involves not only a statute whose remedial purposes require by implication a broad and liberal construction of the employment relationships within its scope (see *Rutherford* case, *supra; Powell*

[10] See also: *Bartels* v. *Birmingham*, 332 U. S. 126, 130 (Social Security Act); *Cosmopolitan Co.* v. *McAllister*, 337 U. S. 783, 790 (construing the Jones Act granting certain new rights to seamen against their employers).

v. *United States Cartridge Co.,* 339 U. S. 497, 516; cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111), but an explicit and deliberate definition which, during its consideration by Congress, was characterized as "the broadest definition that has ever been included in any one Act" (81 Cong. Rec. 7657, 75th Cong., 1st sess.) and of which the Supreme Court has said, "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame" (*United States* v. *Rosenwasser,* 323 U. S. 360, 362).

The pertinent statutory definitions in the Fair Labor Standards Act (which the court below did not mention either in its opinions or in its "findings of fact and conclusions of law," or in its statements to the advisory jury) read as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.
>
> (e) "Employee" includes any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.

The unanimous Supreme Court opinion in the *Rutherford* case, *supra,* emphasized particularly that in determining whether there is an employment relationship subject to the Act, the statute's "own definitions" and the particular statutory objectives are of primary significance (331 U. S. at 729). The determination

"does not depend on * * * isolated factors" or upon any "label" used to describe the relationship (*id.* at 729), but "upon the circumstances of the whole activity" (*id.* at 730) considered in the light of the statutory purposes (*id.* at 727) and the Act's "own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category" (*id.* at 729).

The Fair Labor Standards Act, as the Supreme Court pointed out in the *Rutherford* case, *supra,* "is a part of the social legislation * * * of the same general character as the National Labor Relations Act" (331 U. S. at 723).[11] As in the case of that legislation, the definitions of covered employment "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" (see *Hearst* opinion, 322 U. S. 111 at 129; *United States* v. *Aberdeen Aerie No. 24,* 148 F. 2d 655, 658 (C. A. 9); *Henry Broderick, Inc.* v. *Squire,* 163 F. (2d) 980, 981 (C. A. 9). *"The primary consideration* in the determination of the applicability of the statutory definition" (of employment), the Supreme Court has repeatedly emphasized, "is whether the effectuation of the declared policy and purposes of the Act comprehends securing to the individual the

[11] In its recent opinion in *Powell* v. *United States Cartridge Co.*, the Supreme Court said: "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality amply broad enough to include employees of private contractors working on public projects as well as on private projects." 339 U. S. 497 at 516.

rights guaranteed and the protection afforded by the Act" (emphasis supplied). See *United States* v. *Silk*, 331 U. S. 704 at 713; see also *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398 at 403.[12] When "the economic facts of the relation make it more nearly one of employment than of independent enterprise *with respect to the ends sought to be accomplished by the legislation,*" these factors "outweigh

[12] In *National Labor Relations Board* v. *E. C. Atkins & Co.*, the Court, referring to the "employer" and "employee" definitions, stated: "They [the definitions] also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life." 331 U. S. at 403. For similar statements with respect to the Fair Labor Standards Act, see the *Rutherford* opinion discussed in detail in the text.

The fact that the Social Security Act and the National Labor Relations Act have been amended since these Supreme Court decisions (so as apparently to require the application of common law standards to some extent in determining the existence of the employment relationship), in no way lessens the force of these decisions so far as the Fair Labor Standards Act (which has not been so amended) is concerned. As pointed out in a recent decision of the Fourth Circuit, the fact that in such amendments "no reference was made to the Fair Labor Standards Act or to the decisions thereunder would clearly indicate that no change in that law as applied by the courts under that act was intended" (*McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 at 639). Although the Act as it had been applied was comprehensively reviewed by Congress when it was amended in substantial respects by the Fair Labor Standards Amendments of 1949, approved October 26, 1949 (c. 736, 63 Stat. 910, 29 U. S. C., Supp. III, sec. 201), the definitions of employment were left unchanged. Thus "it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon * * * and approved by the courts" (see the recent Supreme Court decision in *National Labor Relations Board* v. *Gullett Gin Co.*, 71 S. Ct. 337, 340).

technically legal classification for purposes unrelated to the statute's objectives and bring the relation within its protection." See *Hearst* case, 322 U. S. at 128).

Plainly, the procedure followed by the court below in the instant case was not designed to give adequate consideration to either the statutory definitions or "the economic facts of the relation" in the light of "the ends sought to be accomplished by the legislation." As noted in the *Statement, supra,* pp. 15–16, the court submitted interrogatories to the jury without putting the questions in the context of the statutory definitions and purposes, and with barely a passing reference to the statute by name (R. 117–124). Indeed the jury was specifically advised that it was "not to pass on any question of law or anything relating to a question of law," and counsel were instructed "not to argue the law in the case" to the jury (R. 341). The court's remarks to the jury, in submitting the interrogatories, plainly reveal that the court drew no distinction between the employment relationships covered by the definitions and purposes of the Act and the ordinary common law concepts of employment and independent contractor for other purposes. (R. 124, 341–342). The court's opinions indicate that the factor which most influenced its decision—which the court found "most impressive"—was the jury's finding that "there was a custom to have the loading of cars performed by independent contractors 'in this community' " (R. 70, 87). Apparently overlooking not only the terms of the statutory definitions but also the expressed "Congressional policy of uniformity" in its application (see *Brooklyn Savings Bank* v. *O'Neil,*

324 U. S. 697, 710), the court frankly announced that it would be guided by "what the *community* thinks about the lengths that we should go in enforcing this statute" (R. 111; emphasis supplied).[13]

It is thus clear from the statements made by the court at the pretrial conference, from its advices to the jury, as well as from its "findings of fact" and its opinions, that virtually no consideration was given the statutory requirements and purposes.

[13] The Supreme Court has repeatedly pointed out that the basic national policy of the federal Act was to eliminate (insofar as interstate business was concerned) the differences in minimum labor standards among communities and States, and to establish "uniformity of its regulation" (see *United States* v. *Darby*, 312 U. S. 100 at 119) so as "to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in cost based upon substandard labor conditions" (see *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 669–670). Compare the *Hearst* case, where in response to the argument that weight should be given State laws in determining who were employees, the Supreme Court ruled that "federal legislation, administered by a national agency, intended to solve a national problem on a national scale" is *not* to be "limited by such varying local conceptions, either statutory or judicial * * *" nor is it "to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." 322 U. S. 111 at 123. See also *McComb* v. *Farmers Reservoir and Irrigation Co.*, 167 F. 2d 911 at 915 (C. A. 10), affirmed 337 U. S. 755, where the Supreme Court refused to consider local law concepts of agriculture in determining the scope of the agriculture exemption from the Fair Labor Standards Act, saying: "To adopt that test would introduce into the statute variations and differences as widely apart as the laws of the several states. Persons engaged in identical work would be within the statute or exempt from its provisions, depending upon the location of their work and the attitude of the particular state. The statute is not expanded to include some employees and limited to exclude others engaged in the same work, depending upon local statutory or judicial concepts."

The *Rutherford* and *Silk* decisions not only establish the error of the court below in disregarding these "primary" considerations, but the factual circumstances in those cases so strikingly parallel the circumstances of the loading and bookkeeping work in the instant case, on the whole and in detail, as to foreclose any different result on the ultimate issue of employment. This is readily apparent from a comparison of the undisputed facts in the instant case with the facts of the *Rutherford* and *Silk* cases.

### A. The Loaders

The *Rutherford* case involved meat boners who were designated independent contractors, under written contracts with a slaughterhouse operator, which provided that they should hire, compensate, supervise, and perform the boning operations in the slaughterhouse as "independent contractors." In its unanimous opinion the Supreme Court held that both the "contractor" boner and the assistants hired by him were employees of the slaughterhouse operator within the meaning of the Fair Labor Standards Act; it expressly ruled that an employer cannot escape responsibility under the Act by interposing an intermediary to whom the authority to hire and fire and pay wages is delegated "Where the work done, in its essence, follows the usual path of an employee," and that "putting on an 'independent contractor' label does not take the worker from the protection of the Act" (331 U. S. at 729).

Corresponding to the oral understanding which the court below found to exist between appellee and the

lumber loaders in the instant case, in the *Rutherford* case it was expressly agreed by *written* contract that the boner-contractor should perform the work "as an independent contractor" and "should assemble a group of skilled boners to do the boning" in the vestibule of the meat packing plant,[14] that he should employ and compensate his own assistants,[15] that his employees should be subject to his sole direction and control and that the slaughterhouse operator should not have the right to direct or supervise the work of either the contractor boner or his employees.[16] As in the instant case, the trial court in *Rutherford* found that the owner did not in fact interfere in any way in the control and supervision of the boning.[17]

In the *Rutherford* case, as here, the work was paid for at a "contract" rate of a fixed amount per hundredweight of boned beef (156 F. 2d 514). In *Rutherford,* however, the contractor's independence was recognized to the extent of making the payments to him in a lump sum from which he in turn paid the other boners, whereas in the instant case each of the loaders is individually paid by appellee like all of the admitted employees, on the company's regular monthly payday (R. 160–161). As in this case, the boning contractor and his crew worked on the

[14] 331 U. S. at 724; cf. fdgs. V, VI, XXX, XXXIV in the instant case, R. 75, 79–80.

[15] See Court of Appeals opinion 156 F. 2d 513 at 514–515; cf. fdgs. XVI, XVII, XX, XXV, XXIX in the instant case, R. 77–79.

[16] 331 U. S. at 725, see also opinion of Court of Appeals 156 F. 2d at 515; cf. fdgs. VII, VIII, X in the instant case, R. 76.

[17] See concurring opinion of Circuit Judge Phillips, 156 F. 2d at 518.

premises of the owner and were furnished with most of the necessary equipment (331 U. S. at 725). However, in *Rutherford* the boners did furnish their own hooks, knives, and leather belts (*ibid.*), in contrast to the loaders in the instant case who furnish none of their own equipment (Stip. R. 40–41; R. 245, 320–321). In the *Rutherford* case, as here, no specific hours were fixed by the owner of the business (331 U. S. 726), but just as in this case the hours are determined by the need to load the lumber "as quickly as possible after it is delivered" to the loading dock (R. 322, 185), so in *Rutherford,* the hours worked by the boners were determined by the need to "keep the work current" which depended "in large measure upon the number of cattle slaughtered" (331 U. S. at 726).

Just as the lumber is sawed and otherwise processed by admitted employees before delivery to the loaders in the instant case, so in the *Rutherford* case the cattle were slaughtered, skinned, dressed, and otherwise processed by admitted employees before delivery to the boning vestibule (*id.* at 725). As in this case the lumber is delivered to the loading crew by admitted employees, some of whom also work on the loading dock along with the loading crew, so in the *Rutherford* case admitted employees moved the processed carcasses to the boning crew and "the boners work alongside admitted employees of the plant operator at their tasks" (*id.* at 726). Just as the loaders here are experienced and can perform the loading in accordance with the railroad regulations without detailed supervision from the lumber com-

pany, so in the *Rutherford* case the trial court found that "boning is a special art, requiring training and experience" (see 156 F. 2d at 518) and the "skilled" boners performed this "specialty job" in compliance with Government specifications and regulations without supervision from the slaughterhouse operator (see 331 U. S. at 724, 730). In contrast with the La Duke Company, however, the slaughterhouse operator in *Rutherford* did *not* treat or classify the boners as its employees by making deductions for withholding taxes or by including them in its accident insurance policies or by making Social Security deductions from their pay (see 156 F. 2d at 518; cf. Stip. R. 38; Pltf. Exs. 21–A, 21–B, 21–C).

The striking analogy between the instant case and *Rutherford* is carried even to the point of the emphasis placed by the trial courts in both cases on the "custom" in the vicinity to have the work done under independent contractors—(see specific finding in *Rutherford* that the contract method "is commonly employed in Kansas City and elsewhere" and that " 'most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors,' " 331 U. S. at 730; cf. opinion below in instant case, R. 70, 87).

As indicated in the above comparison, *the trial court* in the *Rutherford* case, as in the instant case, made general findings of fact which emphasized the independent aspects of the boning crew and the lack of control and supervision over their work, and concluded that the relationship between defendant and the beef boners was not an employment relation

within the meaning of the Fair Labor Standards Act (see detailed account of the findings in 156 F. 2d at 517–519). Despite the trial court's "findings of fact," the Court of Appeals reversed and its decision was affirmed by a unanimous Supreme Court. Both the Court of Appeals and the Supreme Court concluded that in a case of this kind the findings of the trial court on "isolated factors" of the relationship are not decisive of the ultimate issue whether there is an employment relationship within the meaning of the statutory definitions and purposes. Referring specifically to the trial court's findings on the independence and freedom from control of the boners, the Court of Appeals, in language particularly apposite to the "findings of fact" in the instant case, stated that they were "not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law, and as it expressly or by fair implication brings within its ambit workers in the status of these boners * * *" and that it was immaterial whether the relationship "has been that of employer and independent contractor for other purposes" (156 F. 2d at 516). Echoing this same view, the Supreme Court quoting specifically the district court's finding of "custom" in the vicinity and in the industry (331 U. S. at 730), ruled that "the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity" (*ibid.*). Similarly, in the *Silk* case, despite "the concurrence of the two lower courts" in "finding" the unloaders of coal cars

to be independent contractors, the Supreme Court reversed on the ground that "These inferences were drawn by the courts from facts concerning which there is no real dispute." 331 U. S. at 716.[18]

The circumstances of the coal unloaders held to be employees in the *Silk* case, in some respects even more so than the *Rutherford* meat boners, closely resemble the status of the loading crew in the instant case.

---

[18] The Supreme Court in a number of other decisions, and also numerous decisions of this Court as well as of other courts of appeals, confirm the soundness of thus viewing and dealing with "findings" which are simply ultimate inferences from undisputed or documentary evidence or which are essentially conclusions of law. *Baumgartner* v. *United States*, 322 U. S. 665, 670; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394; *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. 2d 462, 464 (C. A. 9); *Smith* v. *Royal Ins. Co.*, 125 F. 2d 222, 224 (C. A. 9); *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541 (C. A. 9); *Stuart Oxygen Co.* v. *Josephian*, 162 F. 2d 857 (C. A. 9); see also *Orvis* v. *Higgins*, 180 F. 2d 537, at 539 (C. A. 2), certiorari denied 340 U. S. 810; *Sun Insurance Office, Ltd.* v. *Be-Mac Transport Co.*, 132 F. 2d 535, 536 (C. A. 8); *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (C. A. 3); *Knapp* v. *Imperial Oil & Gas Products Co.*, 130 F. 2d 1, 3 (C. A. 4).

"The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based," said the Supreme Court in the *Baumgartner* case (322 U. S. at 670–671). "The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made." (*ibid.*).

In the *United States Gypsum Co.* case, *supra*, the Supreme Court said: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U. S. at 395.

Particularly, the nature of the work is practically identical—loading lumber in railroad cars as compared with unloading coal from railroad cars (see 331 U. S. at 706). In both cases the work is manual labor of the type which such social legislation was clearly "intended to aid" (*id.* at 718). In both cases the lower courts found that the workers were "not subject to * * * control as to method or manner in which they are to do their work" and required no detailed supervision or instructions except that they "unloaded [or here loaded] the car assigned to them" (*id.* at 716–717, n. 11), and, as the Supreme Court concluded in *Silk,* the principal "was in a position to exercise all necessary supervision over their simple tasks" (*id.* at 718). Whereas the unloaders in the *Silk case* did at least provide their own picks and shovels (*id.* at 717), here the loaders provided no tools or equipment. In both cases the work was paid for at a fixed rate per volume loaded or unloaded. The unloaders in *Silk* worked only "when they wish" and apparently not as regularly (*id.* at 706) as the loading crew here worked. Also the unloaders in *Silk* worked for others at will (*ibid.*).

The lumber loaders' opportunity for "success" and their "risk" of "financial loss" referred to in the findings of the court below (see fdgs. XI and XII, R. 76–77) were of the same nature as evoked the Supreme Court's observation in the *Silk* case that the unloaders "had no opportunity to gain or lose except from the work of their hands and [their] simple tools" (331 U. S. at 717–718). The "finding" of the court below that "the success of the loading * * * depended

primarily upon the foresight of L. W. Derrin'' (fdg. XII, R. 76–77) can mean nothing more, since the evidence in the record indisputably shows that the earnings depended solely on the volume of lumber loaded and appellee controlled the allotment of the railroad cars and the deliveries of the lumber for loading. Obviously "the opportunity for profit from sound management'' (cf. *id.* at 719) was no greater for the loaders here than for the unloaders in *Silk.*[19]

In summary, it plainly appears that appellee's relationship to the loaders has none of the significant indicia of a real independent contractor relation, and meets the entire "non-exhaustive list of tests'' (see *Brown* v. *Luster,* 165 F. 2d 181, 185) which the Supreme Court has considered characteristic of the types of employment intended to be covered by remedial legislation such as the Fair Labor Standards Act.

[19] See also the recently decided Alabama district court case, which merits particular mention because of its close factual analogy to the present case. *Tobin* v. *Rockett,* 10 WH Cases 81, 82–83 (M. D. Ala., 1950). The court held lumber stackers to be employees of the lumber company within the scope of the Act on the following facts:

"Lumber received at defendants' lumber yard, which was on the same property with and adjacent to the planer mill, was stacked by hand by lumber stackers, who were supervised by a chief lumber stacker. They stacked lumber on defendant's lumber yard, which lumber was then either further processed at the planer mill or sold in carrying out the business defendants were set up to perform. The lumber stackers had no investment in facilities or equipment, but merely worked with their hands. The stackers have no business organization and no organization which moves as a group from job to job holding itself out to the public to contract the stacking of lumber."

See also: *McComb* v. *United Block Co.,* 9 WH Cases 194 (W. D. N. Y., 1949) [timber fellers].

(1) Obviously the loaders meet the employment criteria so far as the "investment" test is concerned, even more clearly than the boners and unloaders in *Rutherford* and *Silk*. They not only worked on appellee's premises but did not even have any small investment in tools, like the knives and belts of the boners and the picks and shovels of the loaders.

(2) It is equally obvious, despite the court's "finding" that Derrin was engaged in an independent business of lumber loading, that there was here no independent "business organization that could or did shift as a unit from one business to another" (see *Rutherford* opinion, 331 U. S. at 730; cf. *Bartels* v. *Birmingham,* 332 U. S. 126, involving "name bands" which moved as a unit from hotel to hotel). The loading crew did not move about from lumber business to business as a unit, and the "economic realities" are that Derrin and his assistants had no independent financial or economic resources but were wholly dependent on appellee's business for their work and earnings.

(3) Nor can there be any question (notwithstanding the conclusory "finding" to the contrary by the court below) that the loading here was as integral a part of appellee's lumber business, as was the unloading a part of *Silk's* coal business, and the boning a part of the slaughterhouse business in *Rutherford.* The loading here was performed "in the course of the employer's [appellee's] trade or business" (see *Silk* at 718) in precisely the same manner as the unloading in *Silk,* except that the unloading preceded the other steps in *Silk's* business. It is clear that the loading

here was part of the continuous operation of appellee's business, "carried on in a series of interdependent steps," each "performed in its natural order" (Cf. *Rutherford* opinion at 725, 726). The integral nature of the loading is further evidenced by the fact that appellee freely assigns its regular mill employees to the task whenever they are required; the fact that the carrier drivers, without appellee's intervention, routinely assist in the loading when needed; and the fact that appellee is responsible for all arrangements (securing and assigning cars, making out tally sheets, and returning them to mill, determining times and amounts of deliveries of lumber to loading dock, paying demurrage charges, and determining shipping dates) which immediately precede and follow the manual loading operation itself. Cf. *Earle* v. *Babler,* 180 F. 2d 1016, 1018 (C. A. 9), where this Court held truck owners and drivers operating under similar conditions of control to be employees and not independent contractors for purposes of a federal transportation tax.

(4) With respect to the degree of control and supervision over the work, the Supreme Court has plainly indicated that the significance of this factor is not to be judged by technical legalistic standards, but is to be weighed realistically in relation to the nature and complexity of the work to be done. While the degree of control by the principal has been considered quite important in passing on the employment relation under the "common law 'test' which determines an employer's liability in tort" (see *United States* v. *Aberdeen Aerie No. 24,* 148 F. 2d 655 at 657),

the Supreme Court has said that the relationship subject to social legislation is "not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of service rendered to his business by the worker or workers" (*Bartels* v. *Birmingham,* 332 U. S. 126, 130). Thus, in the *Silk* case, despite the "finding" concurred in by both lower courts that there was not "such reasonable measure of direction and control over the method and means of performing the services * * * as is necessary to establish a legal relationship of employer and employee" (155 F. 2d 356, 358–359), the Supreme Court reversed, disposing of this point with the observation that the alleged employer "was in a position to exercise all necessary supervision over their simple tasks" (331 U. S. at 718). In much the same manner as the employers of the loaders and boners in *Silk* and *Rutherford,* appellee, through daily visits to its loading dock and the detailed instructions on the tally sheets "kept close touch" on the loading operation and was indisputably "in a position to exercise all necessary control over their simple tasks." (See *Rutherford,* 331 U. S. at 726, 730; *Silk, id.* at 718.)[20]

---

[20] An additional element of control, which this Court as well as the Supreme Court has recognized as characteristic of employment as distinguished from an independent contractor, is that appellee's "right to discharge" the loading crew (by discharging Derrin) "at any time, existed." See *Earle* v. *Babler*, 180 F. 2d at 1018, where the fact that the drivers and trucks were "hired on a day to day basis with a right of termination at any time," instead of on a definite term basis, was characterized by the Court as "an important distinction." The Supreme Court decisions accord with this view. See the Court's emphasis on "permanancy of relation" in distinguishing the truck drivers from the unloaders

(5) Finally, it is evident on this record that "the initiative, judgment or foresight of the typical independent contractor" played no more part in the success and earning power of the loading crew than they did in the case of the meat-boning crew in *Rutherford* or the unloaders in *Silk*. The trial court's "finding" that "the success of the loading and the amount of money to be earned * * * depended primarily upon the foresight of Derrin," manifestly, on this record, can have no reference to the foresight characteristic of "the typical independent contractor." The admitted fact that the earnings were so divided that the supposed "employer" (Derrin) received 10¢ less per thousand board feet that his purported employees (R. 227) of itself seems almost sufficient to belie the "finding." The only meaning the "finding" can have is that the loading crew earned the fixed piece rates only as and if they exercised the ordinary "foresight" of any pieceworker, to be on the job and get as much of a volume of work done as the time, conditions, and materials supplied by the employer will permit. As already noted, concededly appellee controlled the times and amounts of the lumber delivered for loading and the assignment of cars to be loaded. Under such circumstances, while the loaders' earnings within these limits "depend upon the efficiency of their work," plainly "it was more like piecework than an enterprise that actually depended for success upon the ini-

---

in the *Silk* case. 331 U. S. at 716. See also *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 523; *Bowser* v. *State Industrial Accident Comm.*, 185 P. 2d 891, 897, cited with approval by this Court in the *Earle* opinion, *supra*, 180 F. 2d at 1019.

tiative, judgment or foresight of the typical independent contractor" (*Rutherford,* 331 U. S. at 730).

Viewing the above criteria, not as "isolated factors but rather upon the circumstances of the whole activity," in the light of the Act's own "broad definitions" and its purpose to correct "economic evils" (*Rutherford,* 331 U. S. at 727, 728, 730), the Supreme Court concluded in the *Rutherford* case that the boning was not an independent enterprise (331 U. S. 730):

> * * * The premises and equipment of [the slaughterhouse operator] were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

We submit that this description fits almost precisely the loading operations in the instant case and that the same conclusion as to their status under the Act is inescapable.

### B. The Bookkeeper

Under the criteria established by the controlling Supreme Court decisions, there would appear to be even less reason for holding the bookkeeper to be an independent contractor than the loading crew. He

appears to have been simply a white-collar clerical worker spending regular hours, full time, performing the bookkeeping and office work at appellee's mill. Clerical personnel, and specifically bookkeepers with status and functions identical to those of Nelson, have been assumed without question to be employees in numerous cases arising under the Act. See, for example, *Farmers Irrigation Co.* v. *McComb,* 337 U. S. 755, where the bookkeeper, as here, received a monthly salary and alone performed the company's metropolitan office work, keeping the company's ledgers, checking the employee time sheets, preparing the annual financial statement as well as reports required by law, and performing other such functions necessary in the conduct of the business.[21] It was never questioned that the bookkeeper was an employee, the main issue being whether he was exempt as an "employee employed in agriculture" (337 U. S. at 770; section 13 (a) (6) of the Act). Another example is *George Lawley & Son Corp.* v. *South,* 140 F. 2d 439 (C. A. 1), where the bookkeeper, also paid a monthly salary (in excess of Nelson's), spent the "great majority of his time as an ordinary bookkeeper," although he also acted as "head bookkeeper and office manager" (140 F. 2d at 441). Again, no question was raised as to the employment relationship.[22] See also *Overnight Motor*

[21] See Brief for the Administrator, Nos. 128 and 196, Supreme Court of the United States, October Term, 1948, p. 10.

[22] Similar illustrative cases are legion. See e. g.: [6 office workers] *Roland Electrical Co.* v. *Walling*, 326 U. S. 657; ["'White collar' workers"] *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C. A. 9); [bookkeeper-office manager] *Walling* v. *Yeakley*, 140 F. 2d 830 (C. A. 10); [bookkeeping and general clerical work] *Hertz Drivurself Stations*

*Co.* v. *Missel,* 316 U. S. 572, 580, one of the earliest cases in which the Supreme Court had occasion to consider the application of the Act to salaried employees, where the Court found "no problem * * * in assimilating the computation of overtime" for such employees whether their hours were "regular" or "fluctuating."

The bookkeeper in the instant case does not appear to have a single attribute of an independent contractor, even under common law concepts. He plainly meets all of the tests of employment pertinent here. *First,* he works on appellee's premises at the mill and appellee defrays "all operating expenses" and furnishes substantially all the facilities commonly used in work of this kind (Stip. R. 40–41).

*Second,* unlike "an independent businessman," Nelson does not maintain an independent office, nor make any outlay which is ordinarily part of the risk of profit or loss assumed in the course of independent

v. *United States*, 150 F. 2d 923 (C. A. 8); [clerical workers] *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C. A. 6); [office workers] *Meeker Cooperative Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C. A. 8); [ordering goods and keeping books concerning them] *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395 (C. A. 5), modified on another point and affirmed 317 U. S. 564; [office workers who perform clerical duties including bookkeeping, accounting and ledger work] *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); [bookkeeping and general office work] *Cassone* v. *Wm. Edgar John & Associates*, 57 N. Y. S. 2d 169, 185 Misc. 573; [general office work, bookkeeping, making reports, preparing and reporting payroll data] *Moss* v. *Postal Telegraph-Cable Co.*, 42 F. Supp. 807 (M. D. Ga.); [bookkeeping and general office work] *Brown* v. *Minngas Co.*, 51 F. Supp. 363 (D. Minn.); [bookkeeping and compilation of statistical reports] *Hogue* v. *National Automotive Parts Assn.*, 87 F. Supp. 816 (E. D. Mich.).

venture. He is not a certified public accountant "engaged in a distinct occupation or business" (see *Earle* v. *Babler,* 180 F. 2d 1016 at 1018, n. 2 (C. A. 9)), nor does he proport to practice an independent profession taking business from a miscellaneous variety of clients (cf. physician in *United States* v. *Aberdeen Aerie No. 24,* 148 F. 2d 655, 657 (C. A. 9)). His work for appellee does not constitute "a comparatively small percentage" of a "general practice" (cf. *id.* at 657), but requires virtually all of his regular daytime working hours and leaves little time or opportunity for remunerative work for others. There is literally no evidence in the record that Nelson incurred the slightest risk of profit or loss other than being docked like any other employee for absences from work. Otherwise he was paid at the flat rate of $325 per month, minus the deductions made by appellee for income-tax withholdings, Social Security taxes and the employees' insurance program (Stip. R. 37, 38). Obviously, these deductions confirm the employment relationship and are irreconcilable with an independent contractor relationship (see *Statement, supra,* pp. 9, 12; R. 271, 272; pltf. exs. 13, 15). In short, there is not an iota of support in the record for the district court's "finding" that Nelson was subject "to risk out-of-pocket financial loss" (Fdg. XI, R. 76) by the performance of his work for appellee.

*Third,* bookkeeping services such as those performed by Nelson unquestionably are as integral a part of appellee's business as they are of any business, notwithstanding the extraordinary and wholly unsubstantiated "finding" of the court below to the contrary (see

fdg. XV, R. 77). Admittedly the bookkeeping and office work must be carried on continuously and kept current if the business is to run in anything like an orderly manner (R. 183). Unquestionably this work is performed "in the course of the employer's [appellee's] trade or business" and "as a matter of economic reality" Nelson's work is essentially dependent upon appellee's business (see *Silk* at 718; cf. *Bartels* v. *Birmingham,* 332 U. S. 126 at 130). This is sufficient to bring him within the definitions of employment contained in this Act (cf. *Silk* opinion, *ibid.*).

*Fourth,* so far as the element of control and supervision is concerned, while Nelson's work, because of its clerical and specialized nature, required no detailed supervision (R. 183, 265–267, 278), it is clear that Bloise La Duke in his capacity as appellee's office manager kept fairly "close touch on" Nelson's work from day to day (see *Rutherford* case, *supra,* 331 U. S. at 730), gave him instructions when the occasion required (R. 274) and in general "was in a position to exercise all necessary supervision" (*Silk* opinion, *id.* at 718).

Finally, Nelson's opportunity for gain or loss in his work for appellee was no more dependent upon "the initiative, judgment or foresight of the typical independent contractor" (see *Rutherford, id.* at 730; cf. *Brown* v. *Luster,* 165 F. 2d 181 at 185) than was the work of the loading crew. He prepared the routine books and records required in the course of appellee's business for which he received an unvarying monthly rate of pay (except for typically employee deductions described above). The fact that he could occasionally perform work for others and was not explicitly required to

devote exclusive time to appellee's business is plainly not a sufficiently significant reason for regarding him as an independent contractor (see *United States* v. *Silk,* 331 U. S. at 718, where the Supreme Court pointed out that the unloaders "work when they wish and work for others at will" (at 706); see also *Western Union Tel. Co.* v. *McComb,* 165 F. 2d 65 at 67 (C. A. 6), certiorari denied 333 U. S. 862; *Walling* v. *American Needlecrafts,* 139 F. 2d 60, 62 (C. A. 6); *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391, 392, 393 (C. A. 6); *Walling* v. *Twyeffort,* 158 F. 2d 944, 946 (C. A. 2)). There is, in short, absolutely nothing in the record to differentiate Nelson from other ordinary bookkeepers and office workers who have repeatedly been recognized without question to be within the scope of the Act (see cases cited *supra,* pp. 39–40).

## II

**Appellee in any event should have been adjudged in contempt for violating the "hot goods" provision of the injunction**

Appellee admitted that during the period here involved, when no overtime compensation was paid to the loaders for any work in excess of forty hours per week, the company nevertheless "shipped, delivered, and sold in interstate commerce lumber loaded" by these men (R. 38).

Even proceeding on the theory of the court below that Derrin was the employer of Adams and Pew (R. 86), appellee knew that the labor standards prescribed by the Act were not being met in their employment (R. 140, 161, 228, 280–292; Pltf. Exs. 2, 6, 7, 8, 17a, b, and c, 18). Consequently, it follows that the ship-

ment in interstate commerce of the lumber which they loaded is plainly within the prohibition of Section (2) of the injunction (R. 12) which, like Section 15 (a) (1) of the Act,[23] enjoins

> shipping, delivering or selling in commerce, as such term is defined in the Act, any goods produced in his plant at Cushman, Oregon, *or elsewhere,* in the production of which, or in any process or occupation necessary to the production of which, *any employee* was employed in excess of forty (40) hours in any workweek unless such employee received [overtime] compensation * * * (italics supplied).[24]

---

[23] Section 15 (a) (1) makes it unlawful:

"to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which an employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurances from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.

[24] See: *United States* v. *Darby*, 312 U. S. 100, 121, 122; *Southern Advance Bag & Paper Co.* v. *United States*, 133 F. 2d 449 (C. A. 5); *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 (C. A. 5); *Walling* v. *Belikoff Bros.*, 147 F. 2d 1008 (C. A. 2); *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. A. 10); *Walling* v. *Acosta*, 140 F. 2d 892 (C. A. 1).

Thus the shipment provision was violated regardless of who was the employer of Adams and Pew.

There is no question that the loaders worked "in the production" of the lumber. The statutory definition of the term "production"[25] which includes "handled, or in any other manner worked on," as construed by the Supreme Court, includes "all steps, whether manufacture or not, [including 'every kind of incidental operation'] which lead to readiness for putting goods into the stream of commerce." *Western Union Telegraph Co.* v. *Lenroot,* 323 U. S. 490, 503. The Court specifically included "One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment," although "in a sense he neither manufactures, produces, or mines the goods" (*ibid.*).

Therefore, even assuming the loaders were not *appellee's* employees, Adams and Pew, at least, come within the scope of *"any employee,"* thus clearly warranting an adjudication in contempt for violation of the "hot goods" provision of the injunction.

## CONCLUSION

The loaders and bookkeeper were appellee's employees, and appellee should have been adjudged in contempt, since failure to comply with the overtime,

[25] Section 3 (j) of the Act provides as follows:

"Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

record-keeping and shipping provisions of the district court's injunction so far as these workers are concerned is otherwise admitted. In any event the "hot goods" provision of the injunction has been violated, which would warrant an adjudication in civil contempt.

Although the trial court did not reach the question of the appropriate remedy for civil contempt, we respectfully submit that this question also should be disposed of on this appeal, since the court below plainly indicated its misapprehension of the law on this point. The court below made clear that it regarded the remedy of restitution and a compensatory fine to cover expenses as a wholly discretionary measure in the nature of a "penalty," the imposition of which might depend on the "willfulness" or "bad faith" of the contemnor (R. 108–110, 114–115). But it is now well-settled by Supreme Court decision that "the grant or withholding of [such] remedial relief is not wholly discretionary with the judge." *McComb* v. *Jacksonville Paper Co.,* 336 U. S. 187 at 193, reversing 167 F. 2d 448 (C. A. 5). On the contrary, the Supreme Court not only recognized the power of the courts to grant such remedy but by clear implication ruled that it would be an abuse of discretion to refuse such relief upon a finding of underpayments in violation of the injunction, "the absence of willfulness" or bad faith notwithstanding. 336 U. S. at 191, 193–194. The Fourth and Fifth Circuits have both so construed the Supreme Court's decision. *McComb* v. *Norris,* 177 F. 2d 357 (C. A. 4); *McComb* v. *Crane,* 174 F. 2d 646 (C. A. 5). See also *Penfield*

*Co.* v. *Securities and Exchange Comm.,* 330 U. S. 585, 592, affirming this court's decision in 157 F. 2d 65 (C. A. 9).

Since the court below, despite the fact that Government counsel specifically directed attention to the *Jacksonville Paper* decision on this point, nevertheless affirmed its intent to disregard it (R. 108–109), we respectfully submit that the judgment below not only should be reversed, but that the court below should be directed to include in its judgment, adjudicating appellee in civil contempt, an order for "restitution of any unpaid wages due for overtime work" and for compensation for "the court costs of the instant contempt proceeding" and "the expenses incurred * * * in investigating and presenting this civil contempt case." See the Fourth Circuit's order in the *Norris* case, *supra,* 177 F. 2d at 359, 360.[26]

Respectfully submitted.

WILLIAM S. TYSON,
*Solicitor,*
BESSIE MARGOLIN,
*Assistant Solicitor,*
WILLIAM A. LOWE,
LEONARD APPEL,
*Attorneys,*
*United States Department of Labor,*
*Washington, D. C.*

KENNETH C. ROBERTSON,
*Regional Attorney.*

MARCH 1951.

[26] These expenses, as in the *Norris* case (see 177 F. 2d at 360), have been "proved in detail" here (R. 295–296, 307; pltf. ex. 24).

U. S. GOVERNMENT PRINTING OFFICE: 1951